DOCUMENT RESUME

ED 244 335 EA 016 762

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TITLE Cultural Bias in Special Education Assessment and Placement.
PUB DATE 84
NOTE 11p.; In: Jones, Thomas N., Ed. and Semler, Darel P., Ed. School Law Update...Preventive School Law. p179-188. For complete document, see EA 016 748.
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Access to Education; Educational Discrimination; Elementary Secondary Education; *Ethnic Bias; Intelligence Tests; Legal Problems; Mental Retardation; Special Education; *Student Placement; *Test Bias; Test Interpretation
IDENTIFIERS Larry P v Riles; PASE v Hannon

ABSTRACT

Advocates for minority students charge that special education placement of racially or culturally different students is unfair because the tests, standardized on white, middle-class children, do not accurately reflect the learning rate or potential achievement level of others. For this reason, reliance on IQ tests for placement of minority children in special education has been challenged in the courts. The purpose of this chapter is threefold: (1) to review the court cases that have challenged the use of intelligence or aptitude tests as a basis for special class placement of minority children, especially placement into programs for the educable mentally retarded; (2) to analyze the two best known recent decisions, "Larry P. vs. Riles" and "Parents in Action on Special Education (PASE) vs. Hannon"; and (3) to indicate which of the cultural and racial bias issues raised in the various cases have been resolved and which continue to elude resolution, awaiting further developments. Although the judges in "Larry P. vs. Riles" and "PASE vs. Hannon" came to conflicting verdicts with respect to cultural bias in IQ testing, the authors conclude that both are important benchmarks in the continuing evolution of court rulings, since both affirm that overreliance on IQ testing without regard for other data is likely to be discriminatory and violative of due process. (TE)

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Cultural Bias in Special Education Assessment and Placement

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Considerable attention has been given by special educators and social scientists to the use of intelligence tests in the placement of racial and ethnic minority children into special education classes. Specifically active were: Abeson & Zettel;[1] Bateman & Herr;[2] Berk, Bridges & Shih;[3]

1. A. ABESON & J. ZETTEL, *The End of the Quiet Revolution: The Education For all Handicapped Children Act of 1974*, 44 EXCEPTIONAL CHILDREN 115-127 (1977).

2. B. BATEMAN & C. HERR, *Law and Special Education*, HANDBOOK OF SPECIAL EDUCATION (Kauffman & Hallahan eds. Prentice-Hall 1981).

3. R. BERK, W. BRIDGES & A. SHIH, *Does IQ Really Matter? A Study of the Use of IQ Scores for Tracking of the Mentally Retarded*, 46 AMERICAN SOCIOLOGICAL REVIEW 58-71 (1981). Item A: Educable Mentally Handicapped (EMH) is used by the State of Illinois in preference to Educable Mentally Retarded (EMR). Item B: The evidence came from data collected between 1973 and 1976 by Berk, Bridges, and Shih (1981), the primary thrust of which was meant to establish that IQ remained a critical causal variable in the EMH placement process. The Judge, however, interpreted the significance of the data differently than the researchers. Item C: In interpreting evaluation data, the EAHCA regulations require that each public agency draw upon information from a variety of sources, "including aptitude and achievement tests, teacher records, physical condition, social or cultural background, and adaptive behavior," 34 C.F.R. § 300.533. A footnote in the regulations explains that all these examples would be required to establish a classification of mental retardation.

Gordon & Rudert;[4] Guterman;[5] Macmillan & Meyers;[6] Mercer;[7] and Turnbull & Turnbull.[8] Generally, advocates for minority students have charged that special education placement of racially or culturally different students on the basis of IQ scores is unfair because the tests are standarized on white, middle-class children and therefore do not accurately reflect the learning rate or potential achievement level of other groups of children. Over the past fifteen years, reliance on IQ tests for placement of minority children into special education programs has been challenged in court. As a result, use of the tests has been restricted and even enjoined.

The purpose of this chapter is threefold: (1) to review the court cases that have challenged the use of intelligence or aptitude tests as the basis for special class placement of minority children, especially placement into programs for the educable mentally retarded (EMR), (2) to analyze the two best-known recent decisions: *Larry P. v. Riles*[9] and *PASE v. Hannon*[10], and (3) to indicate which of the cultural and racial bias issues raised in the various cases may have been resolved and which continue to elude resolution, awaiting further developments.

REVIEW OF COURT CASES

A common reference point for litigation in special-education-related cases is *Brown v. Board of Education of Topeka.*[11] Although the case is remembered because it outlawed *de jure* racial segregation in the public schools, the implications of the decision for minority handicapped children were apparent to prophetic readers: if the equal protection clause of the fourteenth amendment could be successfully invoked to outlaw racially segregated schools, it could also be used to protect racial and cultural minorities from inappropriate segregation within a school building—either in regular education or special education programs—based upon culturally and racially biased assessment.

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4. R. GORDON & E. RUDERT, *Bad News Concerning IQ Tests*, 52 SOCIOLOGY OF EDUCATION 174-190 (1979).
5. S. GUTERMAN, *IQ Tests in Research on Social Stratification: The Cross-Class Validity of the Tests and Measures of Scholastic Aptitude*, 52 SOCIOLOGY OF EDUCATION 163-173 (1979).
6. D. MACMILLAN & C. MEYERS, *The Nondiscriminatory Testing Provisions of P.L. 94-142*, THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142): ISSUES AND IMPLICATIONS (Semmel & Heinmuller eds. 1977).
7. J. MERCER, LABELLING THE MENTALLY RETARDED (1973).
8. H. TURNBULL & A. TURNBULL, FREE APPROPRIATE PUBLIC EDUCATION: LAW AND IMPLEMENTATION (1978).
9. 343 F. Supp. 1306 (N.D. Cal. 1979).
10. No. 74 C 3586, 3 EHLR 552:108 (N.D. Ill. 1980).
11. 347 U.S. 483 (1954).

The reach of the fourteenth amendment was tested in the 1967 *Hobson v. Hansen*[12] case, which focused on misclassification and segregation of minority students. Among the issues was the suitability of the use of group-administered aptitude tests to relegate District of Columbia students to rigid educational tracks. The court held that black (and poor) children had been inappropriately placed in lower educational tracks or "blue-collar" programs with reduced academic expectations because of their poor performance on culturally biased, primarily verbal-skills tests. The tracking system was criticized by the court as contributing to the racial segregation of students, resulting in discrimination that locked most blacks into restricted school and post-school careers. The federal judge directed that the tracking system be abolished as violative of substantive due process and equal protection of the laws. Judge Skelly Wright noted:

> Because these tests are standardized primarily on and are relevant to a white middle-class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socioeconomic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.[13]

The next major charge of biased assessment in the education placement process occurred in a California case. The plaintiffs in *Diana v. State Board of Education*[14] were Mexican-American students who came from homes in which Spanish was the primary language. They had been placed in classes for the educable mentally retarded primarily on the basis of scores resulting from the administration, in English, of the Stanford-Binet or Wechsler Intelligence Scales for Children. Upon retesting using bilingual measures, seven of the nine plaintiffs scored above the IQ cutoff score for mental retardation. The plaintiffs filed a class-action suit charging that bias in the administration and use of the tests was a constitutional violation of equal protection of the laws. A 1970 settlement required that students be tested in their primary language, that Mexican-American and Chinese students in EMR classes be retested, and that children wrongly placed be given assistance to facilitate their reentry into regular classes. A follow-up stipulation in June, 1973, required the California Department of Education to oversee the elimination of the overrepresentation of Mexican-Americans

12. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).
13. *Id.* at 514.
14. No. 70-37, *stipulated settlement approved* (9th Cir. June 18, 1973) reported 3 EHLR 551:297 at note 5, lower court (N.D. Cal. 1970).

in EMR classes where the percentage of Mexican-American students significantly exceeded the percentage of Mexican-American children in the general school population.

The *Diana* case differed from *Hobson* in that the claims of biased assessment encompassed not only a racial minority (in this case Chinese) but also a cultural and ethnic minority (Mexican-American). In *Diana* the central issue was not educational tracking, but rather the focus was directly on the special education placement process. Additionally, the case revealed the failure to test in the "primary language of the home" as an important source of bias in the assessment process.

That the reach of the fourteenth amendment was extending became evident in 1972, when a class action suit was filed against the San Francisco Unified School District alleging that six black students had been wrongly placed in programs for the mentally retarded. The plaintiffs charged the inappropriate use of standardized intelligence tests that were racially and culturally biased and that ignored their home learning experiences. In the celebrated *Larry P. v. Riles*[13] plaintiffs charged that such a placement procedure violated the federal Civil Rights Act of 1964 and the right to equal protection guaranteed by both the California Constitution and the fourteenth amendment to the United States Constitution. Unlike *Diana*, biased administration of the tests was not at issue, rather inherent bias in the test instruments themselves. In June, 1972, the federal district court granted a preliminary injunction against the use of IQ tests for EMR class placement. On appeal, the Court of Appeals for the Ninth Circuit upheld the preliminary injunction and enlarged the affected class to include all California black children who had been or in the future would be wrongly placed or maintained in EMR programs.

After seven years of trial proceedings, federal district judge Robert F. Peckham ordered elimination of the disproportionate enrollment of blacks in EMR classrooms and a permanent injunction on the use of standardized intelligence tests for EMR class placement of blacks. In his decision Judge Peckham established the following: (1) the evidence did not show that the fifteen-point-lower mean IQ test score of blacks was the result of genetic inferiority or could be completely explained by lower socioeconomic status; therefore, the lower scores must also reflect racial bias in the tests themselves; (2) the evidence did not validate that the biased scores identified only those blacks who could not profit from regular or remedial instruction and who met the California definition of EMR; (3) intelligence quotients were central to California's EMR placement process; (4) since the scores were both

15. *See* Larry P. v. Riles, *supra* note 9.

biased against blacks and central to placement, they contributed significantly to the disproportionate enrollment of blacks in EMR classes; and (5) the disproportionate enrollment had an impermissibly discriminatory effect on misclassified blacks, since EMR placement was "essentially permanent" and "educationally dead-end, isolating, and stigmatizing."[16] The judge ruled that under the fourteenth amendment, plaintiffs had met their burden of showing that the disproportionate impact resulting from use of IQ scores revealed an impermissible intent to discriminate, even if discrimination were not the predominant intent. School officials could show no compelling state interest to justify the discriminatory intent, nor could they show that any unintended harm imposed by a denial of regular education opportunities was outweighed by a controlling state interest in providing the best possible education to its students, since the EMR program was demonstrably inappropriate for those who were not mentally retarded.

The magnitude of the *Larry P.* decision sent shock waves through the education system and left advocates for minority children hopeful that Judge Peckham's ruling was the precedent they needed to systematically put an end to intelligence testing as an EMR placement tool. However, despite its importance, *Larry P.* was not the culmination of the cultural bias issue in testing.

In 1975, *Parents in Action on Special Education (PASE) v. Hannon*[17] was filed in Illinois as a class action suit alleging that intelligence tests administered by the defendant Chicago school system were culturally biased against black children who had been or would be placed in special classes for the educably mentally retarded. As with the *Larry P.* case, the suit was triggered by the disproportionate number of black children who were enrolled in EMR classes, although unlike the California school districts the Chicago School District is a predominantly black school district. In spite of the fact that the *PASE* case addressed virtually the same issue of racial bias in EMR classification and placement as did *Larry P.*, and that the plaintiffs used many of the same expert witnesses, federal district judge John F. Grady did not find for the *PASE* plaintiffs. His decision reflected an alternative judicial approach to the question of discriminatory testing. Judge Grady observed that Judge Peckham's opinion was "largely devoted to the question of what legal consequences flow from a finding of racial bias in the tests. There is relatively little analysis of the threshold question of whether test bias in fact exists. . . ."[18] Judge Grady saw his job

16. *Id.*
17. *Id.* at note 10.
18. *Id.*

as addressing the threshold question differently than did Judge Peckham in the *Larry P.* decision. Since the plaintiffs' expert witnesses failed to document IQ test bias by reference to enough specific items on the tests, Judge Grady decided he would examine the three principal intelligence tests, item by item—an unusual task for a judge to assume. Using a face validity criterion, he concluded that one item on the Stanford-Binet (Form L-M) and a total of eight items on the Wechsler Intelligence Scale for Children (WISC) and the Wechsler Intelligence Scale for Children Revised (WISC-R) were culturally biased against black children. He further concluded that those few items did not render the tests unfair and would not significantly affect the score of an individual taking the test. Furthermore, Judge Grady found the IQ score was not the sole determinant of mental retardation. Therefore, he held for the defendants that "the WISC, WISC-R, and Stanford-Binet tests when used in conjunction with the statutorily mandated 'other criteria for determining an appropriate educational program for a child' . . . do not discriminate against black children in the Chicago public schools."[19]

AN ANALYSIS OF *LARRY P.* AND *PASE*

Until *PASE* previous litigation, *i.e.*, *Hobson*, *Diana*, and *Larry P.*, had provided a growing trend against the use of intelligence and aptitude tests as a means to continue racial and ethnic minority segregation within the public school system. Thus, did the *PASE* decision represent an end to this trend or even a reversal? And, why did Judges Peckham and Grady come to such divergent conclusions on essentially the same issue when the circumstances of the two cases appeared to be so similar? Several possibilities emerge.

First, as previously suggested, each judge viewed the statistical and psychometric evidence of cultural bias differently. Judge Peckham believed that it substantiated the view that the tests were biased. Judge Grady did not. Their assessment of the possibility of covert rather than overt bias in psychometric testing and of the question of statistical validation of the tests differed significantly.

Second, although both judges dismissed the argument that the fifteen-point differential between the mean IQ score of blacks and whites on intelligence tests was due to genetic differences in the two races, they viewed the relative role of socioeconomic status differently. Judge Peckham accepted the evidence that socioeconomic status accounted for only part of the variance in IQ scores, and he concluded

19. *Id.*

that the remaining variance had to be caused by cultural bias in the test items themselves. Judge Grady, on the other hand, accepted the contention that poverty and cultural disadvantage produced delayed cognitive development which was sufficient to account for mean score differences. His failure to find noticeable cultural bias in the tests themselves (with the exception of the eight items cited) lent credence to this view.

Third, evidence regarding the role of IQ tests in the educational placement process differed somewhat. Unlike the *Larry P.* evidence, the *PASE* testimony demonstrated to the judge's satisfaction that IQ was not the primary criterion used in actual practice. Judge Grady noted that poor classroom performance rather than intelligence tests generated the referral process which led to full-scale asessment. He cited evidence that showed the number of children whose IQ was in the EMH range,[20] but were nonetheless not classified as EMH when the whole assessment process was completed.[21] He concluded that an IQ score was only one of many factors used to produce the classification and determine an appropriate placement. In contrast, Judge Peckham found that intelligence tests triggered the classification in the *Larry P.* case and were actually the primary assessment tool—a violation of the California Education Code.

Fourth, each judge approached the issue of bias in IQ testing with different presumptions about the validity and utility of EMR classifications. Judge Peckham makes clear his belief that EMR placements are isolating, stigmatizing, educationally limiting, and essentially permanent. If a child is misplaced in such a setting, the harm is presumably irreparable. In contrast, while Judge Grady said misclassification is an educational tragedy, he nonetheless appeared to view it as correctable because he noted that significant numbers of EMH students are constantly being shifted back into the regular curriculum as they become "ready for a greater challenge."[22] Such differences in perception about the placement resulting from the testing could very much affect the seriousness with which each viewed the issue of cultural and racial bias, even though the utility and validity of EMR placement was not an issue per se.

Finally, the time interval between the 1972 preliminary injunction in *Larry P.* and the *PASE* arguments had produced the passage of both Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112)[23] and the

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20. *See supra* note 3 at Item A.
21. *Id.* at Item B.
22. Rowley v. Board of Educ. of Hendrick Hudson Cent. School Dist., 632 F.2d 945 (2d Cir. July 1980).
23. The Rehabilitation Act of 1973 (Public Law 93-112) § 504, codified at 29 U.S.C. § 794. Final regulations at 34 C.F.R. § 104.

Education for All Handicapped Children Act of 1975 (P.L. 94-142),[24] followed by the issuance of federal regulations to assure satisfactory implementation of an appropriate education to handicapped children. Both the 504 and EAHCA regulations, in compliance with statutory objectives, attempted to protect children from being misclassified and subsequently misplaced in special edcuation programs. Reflecting particularly the *Hobson*, *Diana*, and *Larry P.* concerns, the regulations stated that materials and procedures were to be selected and administered in such a way as to be culturally and racially nondiscriminatory. Specifically, tests were: (a) to be administered in the child's native language or mode of communication, (b) to be multifaceted, *i.e.*, no single procedure was to be the sole criterion for determining what the appropriate program was to be,[25] and (c) to be validated for the specific purpose for which they were used. The 504 and EAHCA regulations further required that testing be administered by trained personnel and that the evaluation be carried out by a multidisciplinary team rather than by a single examiner. The test instruments themselves were to assess relevant areas of educational need and were to reflect the child's abilities accurately rather than merely reflecting the impairment. Finally, test reevaluations were mandated every three years under EAHCA and "periodically" under Section 504, to avoid the problem of attaching a permanent label which might become inappropriate over time.

Given this set of federal regulatory safeguards, to which the Chicago School Board cited adherence, it is possible that Judge Grady was more prepared to believe the Chicago claims of nonbiased assessment than was Judge Peckham to believe the earlier claims of California's implementation of state and federal requirements. The assessment process, of which IQ testing is just a part, was viewed in its late 1970s context by Judge Grady, whereas Judge Peckham viewed it in a context of what he saw as historically-rooted intransigence.

Although the *PASE* decision conflicts with *Larry P.* and may appear to reverse the trend of earlier decisions, it can be seen in another light as a vindication of many of the earlier concerns. Despite disagreement over to what extent IQ tests are culturally and racially discriminatory, the *PASE* case may stand for the proposition that the use of IQ tests for EMR placement without sufficient regard for other data (*e.g.*, classroom performance, parental input, personal-social skills), and without regard to their methods of administration and interpretation is

24. The Education for All Handicapped Children Act of 1975 (Public Law 94-142), *codified* at 20 U.S.C. § 1401. Final Regulations at 34 C.F.R. § 300.
25. *See supra* note 3 at Item C.

likely to be discriminatory and violative of due process. Viewed in this light even the *PASE* decision furthers the concept of nonbiased assessment championed by its predecessors.

REMAINING ISSUES

While the legislative enactments and regulatory provision of Section 504 and EAHCA attempt to protect minority children from misclassification, it remains for the educational establishment to assume responsibility for implementation of the legislative and regulatory standards and to give practical meaning to those general requirements. As Macmillan and Meyers (1977) have aptly pointed out, it is easier to determine what constitutes discriminatory testing (*e.g.*, administration of IQ tests in English to a Spanish-speaking child) than to ascertain what constitutes nondiscriminatory testing. While the process that is spelled out in statutory and regulatory language suggests the general requirements of nondiscriminatory testing, the particular criteria are not specified and may continue to be tested in the courts. For instance, Section 504 and EAHCA do not establish how three key aspects of nondiscriminatory assessment are to be measured: (1) how cultural bias in test instruments is to be recognized, (2) what constitutes "trained" personnel, and (3) how one is to determine whether a test is valid for the purposes for which it is used.

The *PASE* case can be viewed as a judicial attempt to suggest answers to the first two questions. The judge, in effect, said that cultural bias can be recognized using the superficial criterion of face validity. In contrast, Judge Peckham in *Larry P.* was more willing to acknowledge the possibility that subtle language differences could depress scores across all test items and thereby constitute a form of cultural bias in the tests. Since testing psychologists do not agree as to how cultural bias is to be recognized or eliminated, it is somewhat ironic that the courts are asked to decide what testing experts cannot. In addition, the fact that the IQ scores followed rather than preceded referral for EMH placement and were weighed along with other assessment results was viewed by Judge Grady as evidence that bias from a single instrument would be cancelled out by other factors in the assessment process. However, another judge might wish to ascertain if there were bias in the other factors (*e.g.*, adaptive behavior scales, achievement tests) as well.

Judge Grady also decided that the personnel in the Chicago schools were sufficiently "trained" when he noted that the assessment team was likely to include someone from the child's racial background and that psychological examiners held master's degrees and additionally

had passed theoretical and practical tests administered or educators might require different lengths of time for training, while others might simply require a different kind of training.

Finally, the issue of the validity of IQ tests as a classification tool for mild mental retardation among blacks was sidestepped by Judge Grady since what was at issue was whether the use of such tests invalidated the overall assessment process. However, Judge Peckham found that the validity of IQ tests for use in identification of black EMR students was important to establish. The question of whether tests are valid for the purposes for which they are used is extremely technical, again defying consensus among psychological testing experts, let alone judges. At present it remains unclear how this issue will be illuminated in the courts.

A LOOK AT THE FUTURE

There has been widespread interest in the *PASE* and *Larry P.* decisions, and persons with conflicting viewpoints about cultural bias in IQ tests have hoped that the ruling they supported would be definitive. However, the authors believe that both *Larry P.* and *PASE* are but benchmarks in the continuing evolution of court rulings. Inititally, each decision was appealed, and each could have been overturned by a higher court. Now, although the *Larry P.* case is continuing on appeal, the *PASE* appeal has been dropped because the Chicago School District agreed to a moratorium on IQ testing for EMH placement purposes. So, although the conflicting rulings stand, the current practices in the two jurisdictions are similar. But, given the continuing disproportionate enrollments of ethnic and racial minorities in EMR classrooms across the country, and the unresolved questions indicated above, one can expect continuing challenges to special education assessment procedures and, perhaps, on increasingly technical issues. If the Section 504 and EAHCA regulations are eventually weakened in the wake of deregulatory and decentralization efforts in Washington, D.C., education will have no less a need to assure procedural and substantive due process to its handicapped students. Even if bureaucratic standards become less specific, students still have a civil right to be protected from misclassification, which is an issue of constitutional proportions, involving the claims of denial of equal protection of the laws and of due process. Litigation which previously could have been brought on statutory or regulatory grounds will, if necessary, shift back to constitutional grounds. Though harder to pursue because constitutional violations are harder to prove than statutory violations, the attempt to refine and delineate the use and misuse of intelligence tests can be expected to continue regardless of statutory or regulatory changes.